
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE
APPLICATION OF LTD BROADBAND
LLC FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS
CARRIER FOR PURPOSES OF
RECEIVING FEDERAL UNIVERSAL
SERVICE SUPPORT

**SDTA PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

Docket No. TC21-001

On January 7, 2021, the South Dakota Public Utilities Commission (Commission) received an Application for Designation as an Eligible Telecommunications Carrier (ETC) from LTD Broadband, LLC (LTD). LTD is requesting designation as an ETC for the purpose of being eligible to receive federal universal service support via the Federal Communications Commission's (FCC) Lifeline program and through the Rural Digital Opportunity Fund (RDOF) for the provision of broadband internet access and broadband-voice bundled offerings. LTD has preliminarily been awarded RDOF funding for certain census blocks in South Dakota, see Exhibit A of the Amended Application.

On January 14, 2021, the Commission electronically transmitted notice of the filing and the intervention deadline of January 29, 2021, to interested individuals and entities on the Commission's PUC Weekly Filing electronic listserv. On January 27, 2021, South Dakota Telecommunications Association (SDTA) filed a Petition to Intervene. On February 22, 2021, the Commission issued an Order Granting Intervention to SDTA. On August 12, 2021, SDTA and LTD filed a Stipulation for Protective Order for Confidentiality. On August 26, 2021, the Commission issued an Order Approving Stipulation for Protective Order for Confidentiality. On August 13, 2021, LTD filed a Motion for Prehearing Conference requesting the Commission establish a procedural schedule. On August 27, 2021, SDTA filed a Motion to Compel Discovery.

On September 3, 2021, SDTA filed an Amended Motion to Compel Discovery. On September 7, 2021, LTD filed a Brief Opposing SDTA's Motion to Compel Discovery. On September 9, 2021, SDTA filed a Response to LTD's Opposition to SDTA's Motion to Compel Discovery. On September 10, 2021, SDTA filed a letter regarding its Amended Motion to Compel Discovery and Procedural Schedule and LTD filed a letter regarding the September 14, 2021, Commission Meeting Agenda Items. On September 14, 2021, Commission staff filed a letter detailing a proposed procedural schedule agreed to by all parties. On September 20, 2021, the Commission issued an Order Denying Motion for Prehearing Conference; Order Adopting

Procedural Schedule. On October 22, 2021, LTD filed an Amended Application. On October 22, 25, and 27, 2021, the parties pre-filed their Direct Testimony and Exhibits.

On November 3, 2021, the Commission issued an Order for and Notice of Evidentiary Hearing. On November 5, 2021, the parties filed rebuttal testimony and exhibits. On November 5, 2021, SDTA filed a Motion and Brief in Support regarding Use of Information Marked as Confidential. LTD filed a Motion to Strike Expert Testimony of Larry Thompson, and a Motion to Attend Evidentiary Hearing Via Telephone or Video Link. On November 12, 2021, LTD filed Opposition to SDTA's Motion to Use Confidential Information, SDTA filed an Objection and Reply to LTD's Motion to Strike Expert Testimony of Larry Thompson and Commission staff filed a Response to Applicant's Motion to Strike Expert Testimony of Larry Thompson. On November 17, 2021, SDTA filed a Response to LTD's Opposition to Use of Confidential Information and LTD filed a Reply Brief Supporting Motion to Strike Expert Testimony of Larry Thompson. On November 24, 2021, the Commission issued an Order Denying LTD's Motion to Strike Expert Testimony of Larry Thompson; Order Granting LTD's Motion to Attend Evidentiary Hearing Via Telephone or Video Link.

On December 1, 2021, the Evidentiary Hearing was held as scheduled. On December 20, 2021, the parties filed a proposed procedural schedule.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31 and ARSD 20:10:32. The Commission may rely upon any or all of these laws or other laws of this state in making its determination.

Having considered the evidence of record, applicable law and the arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Decision:

FINDINGS OF FACT

1. RDOF is a broadband infrastructure funding mechanism, created by the Federal Communications Commission (herein FCC), to bring broadband to rural parts of the United States that lack adequate broadband service.
2. The RDOF auction was a reverse auction where interested parties bid on small geographic areas (census block groups) to see which bidder is willing to serve the area with the lowest amount of government support. These areas were selected by the FCC because one or more of the census blocks within these census block groups lack broadband based upon information the FCC receives from broadband providers as part of the FCC Form 477 process.
3. The RDOF census block groups are high-cost areas and lack a financial case for a company to provide broadband and therefore need support to do so. The winning bidder is obligated to build its network according to specific FCC milestones over a 6-year period for the awarded amount, which will be paid out over a ten-year period.
4. LTD participated in the RDOF auction and bid to serve in states across the country.
5. LTD was the lower bidder, thus considered the provisional winner in 15 states. As the provisional winner, LTD stands to receive \$1,320,920,718.60 in support (over 10 years) to serve

528,088 locations with fiber and fixed wireless. In South Dakota, LTD stands to receive \$46,588,454 to serve 7,481 locations. Exhibit L-2, 9:12-16.

6. LTD intends to serve all South Dakota locations with a fiber to the home network. Exhibit L-2, 14:8-10.

7. As the provisional winner, and before the FCC awards any funds, LTD must provide the FCC with information regarding how it will build a broadband network to satisfy the winning bid. Exhibit L-2, pages 6 – 8.

8. The provisional winner is also required to obtain ETC designation. Specifically, the FCC's Order states, “

“Consistent with the CAF Phase II auction rules, a winning bidder in the Rural Digital Opportunity Fund auction will be permitted to obtain its ETC designation after the close of the auction, submitting proof within 180 days of the public notice identifying winning bidders... We recognize the statutory role that Congress created for state commissions and the FCC with respect to ETC designations, and we do not disturb that framework. Nothing in the record addresses the standards necessary to find forbearance in the public interest, even if some interested parties may prefer not to become ETCs with all of the associated obligations. Therefore, we will continue to require service providers to obtain ETC status to qualify for universal service support.” *In the Matter of the Digital Opportunity Fund, WC Docket No 19-126*, Paragraph 92 (Adopted, January 30, 2020).

9. The Commission has jurisdiction over ETC designation in South Dakota.

10. Pursuant to 47 U.S.C. §214(e)(2), the Commission is required to designate a common carrier that meets the requirements of §214(e)(1) as an ETC for a service area designated by the Commission.

11. 47 USC §214 establishes the basic definition of an ETC and goes on to provide state commissions with the primary responsibility for performing ETC designations. 47 USC §214(e). The state is given further authority to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” 47 USC §254(f).

12. ARSD 29:10:32:43.07 was adopted by the Commission pursuant to this authority and states:

“Prior to designating an eligible telecommunications carrier, the commission shall determine that such designation is in the public interest. The commission shall consider the benefits of increased consumer choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the applicant’s service offerings, commitments made regarding the quality of the telephone service provided by the applicant, and the applicant’s ability to provide the supported services throughout the designated service area within a reasonable time frame...” ARSD 20:10:32:43.07

13. On January 7, 2021, LTD filed an Application with the Commission seeking designation as an ETC in South Dakota to serve all census blocks listed in Exhibit A to its Amended Application. SDTA petitioned for and was granted intervener status.
14. SDTA asks the Commission to deny LTD's request for ETC designation. SDTA argues designation of LTD as an ETC is not in the public interest pursuant to ARSD 20:10:32:43.07.
15. An evidentiary hearing was held on December 1, 2021.
16. Lary Thompson, The Chief Executive Officer of Vantage Point Solutions, a telecommunications engineering and consulting company testified on behalf of SDTA. Mr. Thompson is a licensed engineer in 21 states, including South Dakota. Mr. Thompson has worked for hundreds of broadband companies nationwide and has engineered more than \$2.5B in fiber to the home networks
17. Corey Hauer, LTD's Chief Executive Officer testified on behalf of LTD. Mr. Hauer is not an engineer and has no personal experience in the financial aspects of financing, constructing, or operating a fiber to the home broadband network.
18. Both LTD and SDTA ask the Commission to review information they consider to be indicative of "the public interest."
19. Both LTD and SDTA agree that one aspect the Commission must consider when assessing the public interest is LTD's ability to provide the supported services throughout the designated service area.
20. The designated service area includes all census block groups listed on Attached Exhibit A to LTD's Amended Application filed with the Commission.
21. ARSD 20:10:32:43.07 does not define or specify what the Commission should use to judge LTD's ability to provide the supported services throughout the designated service area. However, both LTD and SDTA testified that financial, managerial, and technical abilities are relevant to the consideration. Exhibit L-2, 4:21-23, 5:1-23, 6:1-4; TR 214:25, 215:1-4.
22. An improper or incorrect consideration of construction costs will impact LTD's financial ability to successfully construct the planned network. To determine construction costs in South Dakota, Larry Thompson explained that LTD utilized the RDOF award amount (\$46.6 Million) and multiplied it by 1.3 [REDACTED]. However, given his experience in engineering fiber to the home networks across the state of South Dakota, Larry Thompson believes construction costs will be twice that figure. TR 173:1-3, Exhibit SDTA-1, page 9.
23. LTD's methodology to determine construction costs bears no relationship to actual construction costs. The evidence shows construction costs will be significantly higher than what LTD anticipates. TR 175: 1-3, 170:2, Exhibit SDTA-2, page 9.
24. LTD financial documents project [REDACTED]. However, evidence shows [REDACTED]. Exhibit SDTA-2, page 13, TR 174: 23-25.

25. LTD did not provide evidence to demonstrate its construction cost methodology is accurate or that it has a mechanism to raise the capitol shortfall, that it can subsidize South Dakota service through other business activities, or that it can otherwise become profitable. TR85:5-6. Lack of profitability has a direct correlation to a businesses ability to remain operational. TR 164:16-25, 165:1-25
26. The Commission has an obligation to apply the law in a manner that will best promote the universal service goals found in 47 USC §254(b). Universal service goals are promoted through financially viable carriers likely to remain on the market. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, March 17, 2005.
27. The evidence does not demonstrate LTD is financially able to compete construction or financially able maintain operations of the planned fiber to the home network throughout the designated service area.
28. LTD did not demonstrate it has the managerial ability to comply with regularly obligations. In the RDOF process alone, LTD missed filing deadlines in in California, Kansas, Oklahoma, North Dakota, Iowa and Nebraska. TR 68:1-15.
29. In addition, LTD's request for ETC designation was denied in Iowa. Prior to the RDOF Auction, LTD was an ETC in Iowa. However, the RDOF auction required LTD apply for ETC designation in a larger Iowa service area. Exhibit SDTA-9
30. The Iowa Department of Commerce Utility Board, in its rejection order, explained that LTD has "routinely submitted regulatory filings with obvious errors, if filings were submitted at all." SDTA Exhibit-9.
31. The Iowa Department of Commerce Utility Board also made a ruling regarding the public interest. It found, "The record in this docket does not merit the expansion of a credential that signals to the public that LTD has evidenced the technical and financial capabilities required to carry out the public interest obligations of those entrusted with federal funds. LTD's response and actions lack the candor that the Board would expect from a carrier seeking to evidence the expertise to take on this degree of expansion." SDTA Exhibit-9, page 16.
32. LTD's technical ability can be evaluated by examining how it plans to serve the designated ETC service area. LTD did not share any plans and asked the Commission to rely upon its business experience as indication of its technical ability. Exhibit L-2, 5:13-23.
33. However, LTD did not provide evidence of any similar business experience.
- a. LTD's primary business, to date, is fixed wireless telecommunications and broadband. Generally, LTD does not build infrastructure. TR 53:12-23.
 - b. LTD serves 259 customers in SD. Exhibit L-9, page 3. None of which are served by a fiber to the home network. TR 54:23

- c. LTD serves 18,000 customers nationwide. TR, 109: 22-25, 110:1 - 9
 - d. LTD does not own any fiber infrastructure in South Dakota. LTD has no experience in constructing or operating a network as it proposes to do in South Dakota.
 - e. In September 2021, LTD acquired an existing fiber-based network in Tennessee. This represents the first and only experience LTD has with a fiber to the home operation. This network served approximately 448 customers. Exhibit L-13, page 1, TR 132: 21-23.
 - f. LTD was a successful participant in the FCC CAF Phase II Auction. However, the CAF Phase II Auction obligated LTD to serve 1,407 locations with a fixed wireless network whereas the RDOF Auction obligates LTD to serve 528,088 locations with a fiber network. Exhibit SDTA-8, 1:16-22, 2:1-8.
34. LTD has not developed engineering, networking, or staffing plans to explain how it intends to provide ETC services throughout all areas listed in Exhibit A to its Amended Application.
35. To provide all ETC supported services via fiber, throughout all areas listed on Exhibit A to its Amended Application, LTD must cross National Forest land, private land and Tribal land. To make the crossings, LTD must obtain easements and permits. Exhibit L-11, pages 2-5.
36. LTD is not, however, aware of what permits or easements are necessary and did not provide any evidence of a plan to acquire necessary easements and permits. *Id.*
37. LTD has attempted to contact an impacted tribe. However, LTD is unaware of the cultural preservation process that South Dakota tribes may require. LTD has no plan in place to comply if an impacted Tribe requires cultural preservation studies. *Id.* Exhibit L-13, page 3.
38. Rather than retain experienced contractors, LTD intends to operate its own fiber construction company to install all infrastructure necessary to serve 7,481 locations throughout the designated service area shown on Exhibit A to its Amended Application.
39. LTD does not currently operate a fiber construction company and did not provide any plans or data regarding how it will stand up such a company able to meet construction and service obligations. TR 100:17-20.
40. LTD did not demonstrate it has the technical ability to build a fiber to the home network.
41. In addition to the factors the Commission must consider as part of the public interest pursuant to ARSD 20:10:32:43.07, both SDTA and LTD propose the Commission examine additional items.
42. LTD requests the Commission consider LTD's promise to invest in facilities and equipment, that broadband development will promote economic growth in rural areas, that LTD

intends to open markets to competition, and that LTD's products are innovative. TR 11:22-23, 113:1-5, 113:6-12, 113:14-17.

43. SDTA requests the Commission consider the impact that designating LTD as an ETC in South Dakota will have on South Dakota census block eligibility to receive funding through the \$42.5 Billion Broadband Equity, Access, and Deployment Program funds. TR 166:16-25, 167:1-16

44. The FCC has taken into account the "alternative funding programs for broadband deployment that are readily available at this time" when judging whether RDOF applicants meet ETC state filing deadlines. *In the Matter of Rural Digital Opportunity Fund Auction (Auction 904)*, AU Docket No 20-34, Order Released July 26, 2021 at ¶15. Specifically, the FCC found it appropriate to expect RDOF presumptive auction winners to meet a "high hurdle" due to the availability of other federal and state broadband programs. *Id.*

45. To the extent that any Conclusions of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated by reference as a Finding of Fact.

Based upon the foregoing Findings of Fact, the Commission hereby makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7.1, and 49-31-78, ARSD Section 20:10:32:43 et al, and 47 USC §214(e)(1) through (5), and 47 USC §254(f).

2. The FCC specifically recognized and preserved the state commission role in the RDOF process leaving ETC designation up to the state commission. Therefore, this Commission's role is distinct and different from the FCC role.

3. Pursuant to §47 U.S.C. 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of §214(e)(1) as an ETC for a service area designated by the Commission.

4. 47 USC §214 establishes the basic definition of an ETC and goes on to provide state commissions with the primary responsibility for performing ETC designations. 47 USC §214(e). The state is given further authority to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 USC §254(f).

5. ARSD 29:10:32:43.07 was adopted by the Commission pursuant to this authority and states:

"Prior to designating an eligible telecommunications carrier, the commission shall determine that such designation is in the public interest. The commission shall consider the benefits of increased consumer choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the applicant's service offerings, commitments made regarding

the quality of the telephone service provided by the applicant, and the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame..." ARSD 20:10:32:43.07

6. The Commission finds it is appropriate to consider evidence of an ETC applicant's financial, managerial, and technical ability when considering its "ability to provide the supported services throughout the designated service area within a reasonable timeframe." ARSD 20:10:32:43.07.

7. LTD did not demonstrate it has the financial ability to construct and operate a fiber to the premises network to over 7,000 locations in South Dakota. Evidence shows, LTD failed to fully or accurately consider the costs to construct a fiber to the premises.

8. Evidence shows LTD is not able to manage its current regulatory obligations as a small wireless business that owns relatively little infrastructure. LTD did not provide evidence to demonstrate it has the ability or has a viable plan to acquire the ability to manage the massive infrastructure and internal management grown it must undertake to serve the requested ETC designation area and comply with applicable regulation.

9. LTD did not offer evidence to demonstrate how it will technically serve over 7,000 locations in South Dakota. None of LTD's engineering or network plans are complete, it did not offer evidence regarding when or how it will complete the plans, it has not sought to acquire any permits or easements and is unaware of what cultural or environmental studies may be required.

10. The Commission finds that LTD did not prove its ability to provide service throughout the designated service area as shown on Exhibit A to the Amended Application.

11. ARSD 20:10:32:43.07, lists what the Commission must consider in "the public interest." The rule "uses no language of exclusion or inclusion that serves to indicate only." *Tracfone Wireless, Inc. v. South Dakota Department of Revenue and Regulation*, 2010 SD 6, ¶15. Therefore, the Commission should consider the intent of the Administrative Rule. *DeSmet Inc. Co. of South Dakota, v. Gibson*, 1996 SD 102, P 7. 552 NW 2d 98, 100.

12. The Commission structured ARSD 20:10:32:43.07 consistent with The FCC's March 17, 2005, Report and Order in, *The matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45 (herein FCC Order). It is proper, therefore, to look to the FCC Order for guidance.

13. The FCC found Congress did not intend to tie the hands of state commissions. Rather, the FCC found, "Section 214 demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity." *Id.*

14. Given the intent and purpose of ARSD 20:10:32:43.07 the Commission finds it proper to examine the impact of designating LTD as an ETC on the eligibility of South Dakota to qualify for and obtain other federal and state broadband program funds.

15. If this Commission designates LTD as an ETC, the LTD service areas will be ineligible for any of the "alternative funding programs for broadband deployment that are readily available at this time." *In the Matter of Rural Digital Opportunity Fund Auction (Auction 904)*, AU

Docket No 20-34, Order Released July 26, 2021, at ¶15. Therefore, it is proper for this Commission to consider other negative public interest impacts associated with designating LTD as an ETC.

16. The Commission finds, due to the lack of evidence presented by LTD to demonstrate its ability to provide services throughout the requested ETC designation area, that it is not in the public interest to put all other federal funding, including but not limited to the Broadband, Equity, Access and Deployment Fund monies, at risk.

ORDERED, that LTD's application requesting designation as an ETC is denied.